

General Teamsters Local No. 439, International Brotherhood of Teamsters, AFL-CIO and Luis Rojas and University of the Pacific. Case 32-CB-4602 and 32-CB-4604

November 7, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On April 28, 1997, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent Union filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions,¹ and to adopt the recommended Order as modified.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, General Teamsters Local No. 439, International Brotherhood of Teamsters, AFL-CIO, Stockton, California, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

“(a) Rescind in full the fine assessed against Luis Rojas on or about December 4, 1995, refund to Rojas any amounts he has paid in satisfaction of that fine, and make Rojas whole for all travel or other expenses including any lost wages he may have incurred to attend and defend himself at the proceedings before the executive board and before the Joint Council of Teamsters Local 38 on November 8, 1995, and January 30,

¹ In agreeing with the judge that the Respondent Union violated Sec. 8(b)(1)(A) by disciplining employee-member Rojas, we rely on the fact that Rojas' duties as a leadperson required him, inter alia, to report any work rule infractions to the Employer and the Respondent Union's trying and fining him for this affected his employment status. *Carpenters District Council of San Diego (Hopeman Bros.)*, 272 NLRB 584 (1984); and *Chemical Workers Local 604 (Essex International)*, 233 NLRB 1239 (1977).

² We have modified the judge's Order to make clear that the make-whole remedy includes any lost wages that Rojas may have incurred in defending himself before the Union's executive board and Joint Council of Teamsters Local 38. *Sheet Metal Workers Local 530 (Dynamics Corp.)*, 312 NLRB 229, 234 (1993).

1996, respectively, together with interest as provided in the remedy section of the judge's decision in this case.”

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT impose a fine against an employee-member because he or she reports another employee-member to his or her employer for work rule infractions, at a time when the employee-member's work duties require such reports.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL fully rescind the fine assessed against Luis Rojas on or about December 4, 1995, and WE WILL refund to Rojas any amounts he paid in satisfaction of that fine and make him whole for all travel or other expenses including lost wages he may have incurred to attend and defend himself at the proceedings before our executive board and before the Joint Council of Teamsters Local 38 on November 8, 1995, and January 30, 1996, respectively, together with interest as required by law.

Within 14 days from the date of this Order, remove from its files, and ask the Employer to remove from the Employer's files, any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that it has done so and that it will not use the discharge against him in any way.

WE WILL, within 14 days from the date of this order, request that the Joint Council of Teamsters Local 38 purge its records of the proceeding brought against Luis Rojas in connection with the citation dated August 15, 1995, and WE WILL furnish Rojas with a copy of this request.

GENERAL TEAMSTERS LOCAL NO. 439,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, AFL-CIO

Daniel Altemus, Esq., for the General Counsel.
David Rosenfeld, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld), of Oakland, California, for the Respondent.
James E. Mesnier, Esq. (Cook, Brown, Rediger & Prager), of Sacramento, California, for Charging Party University of the Pacific.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. Luis Rojas (Rojas) filed the charge in Case 32-CB-4602 on April 26, 1996; University of the Pacific (UOP) filed the charge in Case 32-CB-4604 on May 3.¹ Based on those charges, the General Counsel's complaint, as amended, alleges that General Teamsters Local No. 439, International Brotherhood of Teamsters, AFL-CIO (the Respondent or Local 439), engaged in an unfair labor practice within the meaning of Section 8(b)(1)(A) by citing, trying, and fining Rojas on an internal union charge for bringing "harm to fellow union members." The General Counsel contends that Local 439's internal action against Rojas was premised on his performance of "a routine and required function" of his leadperson position at UOP. Although Local 439 admits that it processed internal union charges against Rojas, it contends that it was legally privileged to do so based on the 8(b)(1)(A) proviso and, hence, it denies the unfair labor practice alleged.²

I heard this case at Oakland, California, on January 28, 1997. Having carefully considered the record, the demeanor of the witnesses while testifying, and the posthearing briefs of the General Counsel and Local 439, I have concluded that Local 439 violated Section 8(b)(1)(A), as alleged, based on the following

FINDINGS OF FACT

I. JURISDICTION AND ORGANIZATIONAL STATUS

Respondent admits that it is a labor organization within the meaning of Section 2(5) of the Act and that it is an association with a place of business in Stockton, California, where it represents employees in bargaining with employers. At material times, Respondent has been affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, whose headquarters are located in Washington, D.C. In the course of its business operations in the 12 months prior to the issuance of the complaint, Respondent purchased and received goods or services valued in excess of \$5000 which originated outside the State of California.

¹ The pertinent events here occurred between July 1995 and the filing of the UOP charge. Unless noted otherwise, all further dates refer to the calendar years in that period.

² The relevant portion of Sec. 8(b)(1)(A) provides that it is an unfair labor practice for a labor organization "to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;" Section 7 gives employees the right to engage in union or concerted activities or to refrain from engaging in those activities.

At material times, UOP, a California corporation, has been engaged in the operation of a private university on a 175-acre campus in Stockton. During the past 12 months, UOP derived gross revenues in excess of \$1 million from the conduct of its business operations. Respondent admits that UOP is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

As described in more detail below, Local 439 represents certain UOP employees and has maintained a series of collective-bargaining agreements with that educational institution. Accordingly, I find that the National Labor Relations Board (the Board) has jurisdiction to resolve this labor dispute and that it would effectuate the purposes of the Act for it to do so.

II. THE ALLEGED UNFAIR LABOR PRACTICE

For some time Local 439 has represented UOP's custodial employees and has entered into a series of collective-bargaining agreements with UOP applicable to that unit. The custodial leadpersons are included in the unit represented by Local 439. The custodial collective-bargaining agreement in effect from September 1993 through August 1996 provides that leadpersons may perform unit work and also vests leadpersons with "authority to direct and recommend discipline" of unit employees.

UOP's physical plant department includes a staff of 40 to 45 employees who perform custodial services at the university facilities. At relevant times, Gary Lynch managed the custodial personnel who are organized into five crews. Each crew has a leadperson who, in addition to performing regular unit work, oversees the crew's work and reports to Lynch about the crew's performance.

For the past few years, Luis Rojas has been employed by UOP on its custodial staff. In or about May 1995, Lynch promoted Rojas to a leadperson position. At that time Lynch told Rojas that his leadperson responsibilities included "monitoring [unit] work and employees in his group" and about his expectation that Rojas would report "any problems he may have with personnel, such as unsafe work practices or taking a long break or non-performance of their job." Indeed, Lynch testified that he has demoted a leadperson who failed to provide him with such reports.

In mid-July 1995, Rojas reported to Lynch that he came upon four custodians, Jesse Silva, Andrea Meneses, Lupe Torres, and Lolita Sailot, in a custodial closet, a room dedicated for the storage of custodial supplies, during their regular worktime. According to Lynch, Meneses and Silva had been assigned to clean in another building and, consequently, had no apparent reason for being away from their worksite. By Lynch's account, Rojas reported that he found Meneses and Silva simply sitting in the closet when he entered to search for or deliver some supplies. Although Rojas made no recommendation of any sort about discipline, Lynch subsequently took disciplinary action against Meneses and Silva based on Rojas' report.³

³ The exact nature of Lynch's discipline at this time is unknown. However, documents from the internal union proceeding indicate that at some point, UOP terminated Meneses and suspended Silva but they do not reflect that these severe disciplinary measures resulted solely from Rojas' report to Lynch involved here.

Thereafter, Union Steward Brian Hisel filed an internal union "citation" dated August 15 which claimed that Rojas had violated the collective-bargaining agreement, the local union bylaws, and the International union constitution by "[t]urning in union members to management for disciplinary action against union members for personal gain." Following notices about the charges Local 439's executive board conducted a hearing on Hisel's citation on November 8.

Subsequently, Local 439's secretary-treasurer, Pat Miraglio, issued the executive board's decision dated December 4. In its decision the executive board found that Rojas "caused harm to harm to his fellow members by bringing details to the attention of management." It assessed a \$500 fine against Rojas but held \$400 in "abeyance" for 1 year on the condition that Rojas "must not engage in any such behavior or the entire amount of the fine [would] become due and payable in addition to any fines that may be the subject of additional charges."

In accord with his right as a member, Rojas appealed the executive board's decision to Joint Council of Teamsters Local 38 in Modesto, California. A trial board for Joint Council 38, in effect, conducted a de novo hearing on the matter. That trial board subsequently found Rojas "guilty because he admitted that he turned people in [to management]."⁴ In a ruling dated April 15, it upheld the charges against Rojas, dismissed his appeal, and ordered him to pay the fine levied by Local 439. Rojas and UOP filed the charges in this case shortly thereafter.

The fallout from the closet incident continued to the next negotiations when Local 439 sought some assurance that the leadpersons would first make an inquiry of the employees concerning apparent work rule violations before reporting the matter to the custodial supervisor. Consequently, the parties negotiated a memorandum of understanding with the 1996-1999 agreement which provided, in essence, that the leadperson would report a "violation" only if the employee response was "not acceptable or requires follow-up, complete investigation." According to Joe Kirim, the director of UOP's physical plant, Local 439 complained at negotiations because Rojas was "turning in other members" without investigating to find out what was going on. Kirim agreed to the memorandum of understanding even though he believed that Rojas acted properly in the incident involving Meneses and Silva.

III. ARGUMENT AND CONCLUSIONS

The General Counsel argues that Rojas' duties as a leadperson included "making sure that the employees in his group were working when they were supposed to be" and that it was his "responsibility to report any incidents [to management] where employees were not working as scheduled." The General Counsel further asserts, in effect, that Rojas acted within the scope of his job responsibilities by informing Lynch that he had come upon Meneses and Silva

outside their work area during their worktime. Citing *Carpenters District Council of San Diego (Hopeman Bros.)*, 272 NLRB 584 (1984), and *Chemical Workers Local 604 (Essex International)*, 233 NLRB 1239 (1977), the General Counsel contends that Local 439's fine levied against Rojas for performing his employer-assigned tasks violated Section 8(b)(1)(A).

Local 439 argues that the collective-bargaining agreement defines the leadperson's responsibilities and that Rojas acted outside the scope of those contract-defined responsibilities. Thus, Local 439 asserts that Rojas had a contractual duty to inquire into the reasons for the employees' absence from their assigned work area and to direct them to return to their regular area absent some good reason for them to be where they were found. In effect, Local 439 believes that Rojas would have been justified in reporting the incident to Lynch only if the two employees ignored his direction to return to work or if he repeatedly found the employees outside their assigned area. As Rojas failed to speak to the employees at all, Local 439 contends that its internal discipline was legally justified to compel Rojas' compliance with the collective-bargaining agreement. In support Local 439 cites *Sterling Boiler & Mechanical, Inc.*, 319 NLRB 434 (1995); *Letter Carriers, Branch 9*, 316 NLRB 1294 (1995); and *Auto Workers Local 933 (Allison Gas)*, 307 NLRB 1065 (1992).

These findings control the outcome of this case: (1) Rojas was a nonsupervisory UOP leadperson and a member of Local 439 at relevant times; (2) Lynch expected and instructed Rojas to report infractions of UOP's work rules; (3) Rojas risked demotion from his leadperson position by failing to report work rule infractions; (4) Rojas reported an infraction of UOP's rules by Meneses and Silva to Supervisor Lynch who, in turn, disciplined those two employees; and (5) Local 439 imposed a fine against Rojas for reporting the rule infraction by Meneses and Silva.

The *Carpenters* and the *Chemical Workers* cases cited by the General Counsel, are indistinguishable from this case. In those cases the Board, virtually without comment, adopted the conclusion reached by the respective administrative law judges that a union violates Section 8(b)(1)(A) by disciplining a leadperson-member for reporting work rule infractions to supervision as required. Without belaboring the point, I find that those cases (especially the *Carpenters* case) control the outcome here. Suffice it to say, however, that I do not share the concern expressed by some of my former colleagues in their decisions concerning the absence of "concerted activity" on the part of the leadpersons in cases of this nature. The short answer to their concern is that the leadperson-member in these cases, in effect, refrains from acting in concert with other employee-members who seek to cover up work rule infractions and thereby avoid discipline. As Section 7 protects both those employees who engage in concerted activity as well as those who refrain from engaging in concerted activity, a leadperson's refusal to participate in this type of concerted activity because of a legitimate affirmative duty imposed by the employer is protected by law.

Local 439's argument that its internal union discipline against Rojas was designed to enforce the collective-bargaining agreement lacks factual support. Obviously, the provision in the 1993-1996 collective-bargaining agreement related to the leadpersons is not the sum and substance of their job description. Hence, I cannot conclude as Local 439 ar-

⁴In the Local 439 proceeding, it appears that the executive board entertained a litany of complaints from unit members, including Meneses and Silva, about Rojas' actions as a leadperson. However, the proceedings before Joint Council 38's trial board narrowly focused on Rojas' report to Lynch about Meneses and Silva apparently because UOP refused to release anyone other than Hisel and Rojas from work to attend the trial board's hearing.

gues that Rojas was duty bound by the bargaining agreement to speak to the errant employees first and ignore his supervisor's directive about reporting such matters unless the employees exhibited immediate insubordination or a proclivity to leave their work area. Clearly the 1993–1996 agreement (in effect when these events occurred) imposes no limitation at odds with UOP's requirement that leadpersons report all infractions to their supervisors. And at least until the 1996–1999 agreement, Rojas' employer expected him to do just that. Hence, Local 439's agreement-based argument is far too tenuous for me to conclude that Local 439 had an overriding legitimate interest to protect by means of its internal disciplinary procedure.

Accordingly, on the basis of the General Counsel's precedent, I find that the fine which Local 439 levied against Rojas directly affected his employment status and thereby violated Section 8(b)(1)(A) as alleged.

CONCLUSIONS OF LAW

1. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

2. UOP is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. At all material times, Respondent was the exclusive bargaining representative within the meaning of Section 9(a) of the Act of UOP's custodial employees, including the custodial leadpersons.

4. By the fine levied against him on or about December 4, 1995, Respondent restrained and coerced Luis Rojas and other similarly situated employees within the meaning of Section 8(b)(1)(A) of the Act.

THE REMEDY

Having found Respondent engaged in certain unfair labor practices, I recommend that it be ordered to cease and desist therefrom and take the following affirmative action designed to effectuate the purposes of the Act.

Thus, my recommended Order requires that Local 439 rescind the fine it levied against Luis Rojas on December 4, 1995, and refund any moneys Rojas may have paid in satisfaction of that fine. In addition, as the record reflects that Rojas appeared before Local 439's executive board on November 8 as well as the Joint Council trial board on January 30 in an effort to defend against the charges brought against him, Local 439 is required to reimburse Rojas for any travel and other expenses as determined in the compliance stage of this proceeding he may have incurred in this effort. *Laborers Northern California Council (Baker Co.)*, 275 NLRB 278 (1985). Interest computed as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), shall be added to these amounts. Moreover, Local 439 is required to remove from its records any reference to the internal proceedings against Rojas which are the subject of this case and notify Rojas in writing that this action has been taken and that this matter will not be considered in any future proceedings. Local 439 is also required to request that the Joint Council of Teamsters Local 38 purge its records of this matter and furnish Rojas with a copy of that request. Finally, Local 439 is required to post official notices to members concerning this matter and to provide signed copies of that notice to UOP for posting if it so desires.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, General Teamsters Local No. 439, International Brotherhood of Teamsters, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Imposing a fine on any employee because he or she reports another employee-member to his or her employer for work rule infractions, at a time when it is part of the work duties of the employee who makes the report to do so.

(b) In any like or related manner restraining or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind in full the fine assessed against Luis Rojas on or about December 4, 1995, refund to Rojas any amounts he has paid in satisfaction of that fine, and make Rojas whole for all travel or other expenses he may have incurred to attend and defend himself at the proceedings before its executive board and before the Joint Council of Teamsters Local 38 on November 8, 1995, and January 30, 1996, respectively, together with interest as provided in the remedy section of the judge's decision in this case.

(b) Within 14 days from the date of this Order, remove from its files any and all references to the internal union proceedings against Luis Rojas in connection with the citation dated August 15, 1995, and within 3 days thereafter notify Rojas in writing that it has done so and that it will not use this matter against him in any way.

(c) Within 14 days from the date of this Order, request that Joint Council of Teamsters Local 38 purge its records of the proceedings brought against Luis Rojas in connection with the citation dated August 15, 1995, and concurrently furnish Rojas with a copy of this request.

(d) Within 14 days after service by the Region, post at its office in Stockton, California, and other places where notices to its members are customarily posted copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent Local 439's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(e) Sign and return to the Regional Director sufficient copies of the notice for posting by University of the Pacific, if willing, at all places where its notices to employees are customarily posted.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.